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IN THE

Supreme Court of the United States

October Term, 1963
No. 682

AMERICAN PIPE AND CONSTRUCTION COMPANY, a California corporation, ROBERT V. EDWARDS, ELLIOTT BRAINARD, UNITED CONCRETE PIPE CORP., a California corporation, LLOYD EARL, RICHARD I. YOUNG, and GEORGE L. CURTIS,

Petitioners,

vs.

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, THE HONORABLE PEIRSON M. HALL, THE HONORABLE LEON R. YANKWICH, Judges of the United States District Court for the Southern District of California, Central Division, BATRIS W. PEROVICH, NORTHWEST PIPE LININGS, a Oregon corporation, and IN-PLACE LININGS, INC., a Texas corporation,

Respondents.

Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents and the real parties in interest pray that this Honorable Court deny the Petition for Writ of Certiorari heretofore filed by the Petitioners in the above-named matter, and that the stay, made by this Honorable Court on November 9, 1963, and extended on December 4, 1963, in the within matter, terminate.

Opinions Below.

The opinions of the Honorable Leon R. Yankwich of November 1, 1963, and the Honorable Peirson M. Hall of November 4, 1963, of the United States District Court for the Southern District of California, Central Division, are set forth in the Appendix to the Petition of the Petitioners (Pet. App. pp. 1 and 2). The opinion of the United States Court of Appeals for the Ninth Circuit of November 7, 1963, is also set forth in the Appendix attached to the Petitioners' Petition for Writ of Certiorari (Pet. App. p. 3).

Questions Presented.

(1) Have the constitutional rights of the Petitioners been abridged, more particularly the Fifth Amendment privilege against self-incrimination, *where the depositions of certain of the individual Petitioners have not yet been taken*, so as to determine whether or not any questions put to the individual Petitioners might tend to incriminate them?

(2) Can this Honorable Court, or any other Court in this matter, properly adjudicate the scope of the privilege against self-incrimination asserted by the individual Petitioners until questions have been put to them upon the taking of their depositions?

(3) Does the Fifth Amendment privilege against self-incrimination extend to these corporate Petitioners?

(4) Was there an abuse of discretion by the United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit in denying the Petitioners' motions?

Statement of the Case.

The Respondents and real parties in interest herein, Inplace Linings, Inc., a Texas corporation, Northwest Pipe Linings, an Oregon corporation, and Batris W. Perovich are engaged in the business of the inplace rehabilitation of new and used steel and concrete pipe. In March and April of 1963, three private civil anti-trust treble damage actions were commenced by these Respondents in the United States District Court for the Southern District of California, Central Division, against, among others, the corporate Petitioners.[1] The depositions of the Respondents and the officers of the Respondents were then taken. These depositions consumed approximately four days. After the filing of a First Amended Complaint for treble damages, Motions to dismiss were filed by all of the Defendants. Thereafter, the Petitioners, United Concrete Pipe Corp. and American Pipe and Construction Company, and two other Defendants, American Vitrified Products Company and Pipe Linings, Inc., filed their Motions to stay discovery in the three civil anti-trust matters. All Motions came on for hearing on September 9, 1963, before the Honorable Leon R. Yankwich. The Petitioners at the time of the hearing on September 9, 1963, urged to the Court that the Motions to stay discovery should be granted on the basis that the Petitioners were then the subject matter of a Grand Jury investigation, investigating the concrete and coated steel pipe industries, and that the taking of any depositions would tend to

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[1] *Batris W. Perovich et al. v. Pipe Linings, Inc., et al.* (No. 63-278-Y); *Northwest Pipe Linings v. Pipe Linings, Inc., et al.* (No. 63-279-Y); and *Inplace Linings, Inc. v. Pipe Linings, Inc., et al.* (No. 63-321-Y).

incriminate the individual prospective deponents, the individual Petitioners herein (App. pp. 18-23).[2] At the time of the hearing, the Court in its remarks from the bench, indicated that notwithstanding the fact that depositions were taken, the individual deponents could assert their Fifth Amendment privilege at the time of the taking of the depositions [Rep. Tr. of hearing of September 9, 1963, p. 6, lines 23-45, and p. 7, lines 1-3 and 13-20].[3] The Court went on to say that it *would adjudicate which questions could properly be put to the deponents and which could not after the depositions were commenced of the prospective deponents and the questions put to them* [Rep. Tr. of hearing of September 9, 1963, p. 7, lines 23-25, and p. 8, lines 1-4].[4] On November 1, 1963, Judge Yankwich made his Order denying the Motions to stay discovery, and ordered that the depositions of Messrs. Earl, Curtis, Young, Edwards and Brainard be taken.[5] Contemporaneously with the execution of his Order of November 1, 1963, Judge Yankwich also made a Minute Order augmenting his Order of November 1, 1963, in

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[2]Reference herein to "App." is to the Appendix filed with the Court of Appeals for the Ninth Circuit on November 7, 1963, which Appendix has been certified to this Court as part of the record herein.

[3]The transcripts of the hearing of September 9, 1963, and November 4, 1963, have been certified to this Court as a part of the record herein.

[4]Counsel for Petitioners agreed with Judge Yankwich on this suggestion as one solution to the problem [Rep. Tr. of hearing of September 9, 1963, p. 8, lines 5-9].

[5]On October 21, 1963, Judge Yankwich rendered his decision denying the Defendants' Motions to dismiss. On October 24, 1963, pursuant to Rule 26, *Federal Rules of Civil Procedure*, the Plaintiffs noticed the taking of the individual Petitioners' depositions, commencing on November 12, 1963, and ending on November 18, 1963.

which Minute Order he ordered that discovery proceedings be resumed, pursuant to Rule 26 of the *Federal Rules of Civil Procedure* (See Minute Order of November 1, 1963, in "Proceedings Had in the United States Court of Appeals for the Ninth Circuit", certified by the Clerk of the Circuit Court and a part of the record herein). On November 4, 1963, the Petitioners again attempted to stay discovery by moving for a protective Order under Rule 30(b) of the *Federal Rules of Civil Procedure* (App. pp. 40-47).[6] These Motions were denied by the Honorable Peirson M. Hall on November 4, 1963 (App. pp. 75-76). Thereafter, on November 7, 1963, the Petitioners moved that the United States Court of Appeals for the Ninth Circuit make its Order granting them the right to file a Petition for Writ of Mandate, or in the alternative, a Stay pending a determination of the Circuit Court of their Application for Petition for Writ of Mandate. Both Motions were denied on November 7, 1963, by the United States Court of Appeals for the Ninth Circuit. On November 9, 1963, the Petitioners moved this Honorable Court to issue its Order staying the taking of the

[6]The principal reason the Petitioners advanced was the imminency of the action by the Special Grand Jury investigating the concrete and coated steel pipe industries. *In the Matter of the Investigation of the Concrete and Coated Steel Pipe Industries*, United States District Court for the Southern District of California (Case No. 941-Misc.). Judge Thurmond Clark had ordered the Grand Jury to indict or return a No-Bill by November 19, 1963 (App. p. 47, lines 27-32, and p. 56, lines 7-24). The United States Court of Appeals for the Ninth Circuit in the case of *United States v. United States District Court et al.*, No. 18,995, by its Order of November 15, 1963, ordered Judge Clark to show cause why his Orders concerning the Grand Jury should not be vacated and set aside. On November 19, 1963, Judge Clark vacated all of his Orders. On December 16, 1963, control of the Grand Jury was transferred to Chief Judge Peirson M. Hall

depositions of the individual Petitioners pending their filing a Petition for Writ of Certiorari. This Application was granted by Mr. Justice William O. Douglas on November 9, 1963, and pursuant to an extension requested by the Petitioners, the Petitioners were given to and including December 23, 1963, to file their Petition for Writ of Certiorari. The Petition for Writ of Certiorari is now on file with this Honorable Court.

Reasons for Denying the Granting of the Writ.

The most important reason, these Respondents feel, for this Honorable Court to deny the Petitioners' Petition for Writ of Certiorari is that at the present time no constitutional rights of the individual Petitioners have been abridged. What these Petitioners are asking this Honorable Court to do, is to pre-judge that all questions put to any individual deponents, whether these individual Petitioners or any other deponent in the employ of the corporate Petitioners, would tend to incriminate those persons. What the Petitioners overlook is the fact that certain of these individual Petitioners and many prospective deponents have already been granted immunity pursuant to the immunity sections of the anti-trust laws of the United States, 15 USCA 32 (App. pp. 101-105, 126-127 and 130-134), and that the scope of immunity granted to these individuals is not narrow, but covers the same material as the three civil anti-trust actions. *These Respondents urge that the correct time to adjudicate the nature of Fifth Amendment privilege against self-incrimination of the individual Petitioners is not now, but at the time that questions are put to these individuals in order to then determine the nature of the question and the status of the person to whom it is put.* If the con-

tentions as advanced by the Petitioners are correct, this Court could impose an indefinite blanket protection upon all persons involved in these matters regardless of their status and regardless of the questions put to them. Not only would this carte blanche obscure the real issues of the litigation, but it would prohibit the orderly process of discovery pursuant to the *Federal Rules of Civil Procedure* in these matters. *The time to correctly view the posture of any deponent is not in advance of the taking of his deposition, but at the time the questions are put to him.* Secondly, these corporate Petitioners herein seek to avail themselves of the Fifth Amendment privilege against self-incrimination, a constitutional privilege to which they are not entitled. Lastly, Respondents urge that there has been no showing of an abuse of discretion by the District Court and the United States Court of Appeals for the Ninth Circuit in correctly denying the Motions of the Petitioners to stay discovery.

(1) The Privilege Against Self-Incrimination Must Be Analyzed in Light of Specific Questions Put to the Deponent.

The Petitioners are seeking to have this Court adjudge that an individual may refuse to attend a deposition in a civil proceeding and that the Fifth Amendment privilege against self-incrimination may be imposed by a deponent prior to the time that any incriminating question is asked or before any incriminating matter confronts him. The basis for the Petitioners' contentions is that there is now pending in the United States District Court for the Southern District of California, an investigation by the Grand Jury, investigating the concrete and coated steel pipe industries.

although to date there have been no claims that the Petitioners have violated any laws of the United States. Notwithstanding this fact, the Petitioners are now making the contention that the pendency of the Grand Jury and the imminency of the Grand Jury's indictment, gives rise to the Fifth Amendment privilege against self-incrimination prior to the time that any depositions are taken.

In addition, the Petitioners seek, with a broad stroke of the pen and a narrow view of the facts, to assert that those persons given immunity by the Grand Jury by virtue of their testimony, are subject to incrimination, in that the scope of the immunity granted by the Grand Jury is untested. There is no question that appearing pursuant to a subpoena in an antitrust investigation and testifying before a Grand Jury automatically gives the witness the immunity granted under 15 USCA 32. *United States v. Monia* (S. Ct., 1942), 317 U. S. 424. The Petitioners contend that the scope of the immunity is narrow in its effect. Quite the contrary, the scope of the immunity granted by 15 USCA 32 is quite broad. This Court, in *Counselman v. Hitchcock* (S. Ct., 1892), 142 U. S. 547, held that the Immunity Act of February 25, 1868, 15 Stat. at L. 37, Chap. 13, was unconstitutional because the Act prevented the use of evidence against witnesses, but it did not preclude prosecution of the witness as a result of information gained from the testimony. This Court indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed this privilege. Thereafter, Congress passed the Act of February 11, 1893, 27 Stat. at L. 443, Chap. 83, which Act broadened the immunity provisions of the original Interstate Commerce Act. The Act of February 11, 1893,

became the model for immunity provisions which were enacted at various times up to and including the enactment of the antitrust Immunity Act of February 25, 1903, 15 USCA 32, which Act reads as follows:

"No person shall be prosecuted or be subjected to any penalty or forfeiture *for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under sections 1-7 of this title and all Acts amendatory thereof or* supplemental thereto, and Sections 8-11 of this title: * * *" (Emphasis added).

The antitrust Immunity Act of February 25, 1903, does not require a witness to claim his constitutional privilege as a condition precedent to the earning of immunity. *United States v. Monia, supra; Hale v. Henkel* (S. Ct., 1906), 201 U. S. 42; and *United States v. Armour & Co.* (D. C., Ill.; 1906), 142 Fed. 808.

The Petitioners in support of their contentions assert that the pending investigation by the Grand Jury and the three pending civil antitrust matters cover in their scope the same matters. This contention is quite true. Therefore, the scope of the immunity granted by the Grand Jury in furtherance of its investigative process is identical with any facts which would be the basis for relevant questions put to these individual Petitioners upon the taking of their depositions. To those persons who have been granted immunity by the Grand Jury there can be no question that the answers in response to questions concerning these private civil antitrust matters would not tend to incriminate them. *Knapp v. Schweitzer* (S. Ct., 1958), 357 U. S. 371; *Feldman v.*

United States (S. Ct., 1943), 322 U. S. 487; and *United States v. Murdock* (S. Ct., 1931), 284 U. S. 141.

The Petitioners herein are seeking to have this Honorable Court impose a blanket privilege upon all prospective deponents by pre-judging that all testimony would tend to incriminate the individual deponents, including the individual Petitioners herein, although some of the Petitioners have been given immunity in matters that are the same subject matter as these civil antitrust matters. This, the Respondents contend, is contrary to the orderly administration of the discovery process as provided in the *Federal Rules of Civil Procedure*.

In *Independent Productions Corp. v. Loew's Inc.* (S. D., N. Y., 1958), 25 Fed. Rules Serv. 26b. 31, Case 2, in a civil antitrust action, the defendants commenced a pre-trial examination of the president and sole shareholder of the plaintiff corporation. In the course of the examination, the deponent refused to answer a number of questions or group of questions. One of the principal bases for the refusal of the deponent to answer was the imposition of the privilege against self-incrimination as granted by the Fifth Amendment of the Constitution of the United States. The Defendants moved for an order under Rule 37(a) of the *Federal Rules of Civil Procedure* to compel the deponent to answer the questions under threat of contempt. The plaintiffs cross-moved, pursuant to Rule 30(b) of the *Federal Rules of Civil Procedure*, for an order sustaining the plaintiffs' objections to the questions and directing that the defendants not inquire into the subject matter of those questions in *all future* discovery proceedings. The Court denied the plaintiffs' motions to

limit the scope and extent of all future questions and stated as follows:

> "So far as concerns matters other than the listed questions actually propounded to Mr. Lazarus, plaintiffs' motion to limit the scope of defendants' examination [F.R.C.P. Rule 30 (b)] is premature. *Any claim of privilege or irrelevancy should be raised by plaintiffs' objection to specific questions when asked. The court will not, in advance, pass upon anticipated questions.* See Jacobowitz v. Kremer, 7 F.R.D. 110 (S.D.N.Y. 1946); Smith v. Crown Publishers, Inc., 14 F.R.D. 514 (S.D. N.Y. 1953); Brockway Glass Co., Inc., v. Hartford-Empire Co., 36 F. Supp. 470 (W.D.N.Y. 1941); Moore, Federal Practice, ¶30.09 (2d ed. 1950)." (Emphasis added).
>
> *Cf. O'Keefe v. Shaughnessy* (N.D., N.Y., 1950), 95 F. Supp. 900.

In the case of *United States v. Matles* (2d Cir., 1957), 247 F. 2d 378, the Court was confronted with the problem of whether or not the defendant in a civil denaturalization proceeding must take the stand and be sworn in an oral deposition in the matter, where the government sought to take the deposition of the defendant pursuant to Rule 26 of the *Federal Rules of Civil Procedure*. The defendant refused to appear for the examination and refused to be sworn, alleging that appearing as a witness might tend to incriminate him. The defendant was held guilty of contempt by the District Court and the Circuit Court upheld the District Court's finding that in a civil action a party to the action must appear and be sworn, notwithstanding the fact that he may impose the privilege against self-in-

crimination to questions when put to him. The Court was also confronted with the problem of what questions could be put to the deponent defendant once his deposition was taken. The Court, in a concurring opinion of Judge Lumbard, at page 383, held that it could not judge in advance whether or not any incriminating questions would be asked, and stated:

> *"Finally, we cannot say in advance of the examination whether any non-incriminatory question may be asked. Rule 26(b) of the Federal Rules of Civil Procedure was designed to permit broad and searching examination of all matters which would assist a party in discovering evidence.* Thus Rule 26(b) provides:
>
> "'Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.'
>
> "This language is clearly designed to be broad enough to cover almost anything that will help the examining party to discover any leads to evidence. *In practice the district court is not asked to rule*

on the availability of the privilege to refuse to answer until a number of questions have been asked and refused. The district court is thus in a position to determine the incriminatory nature of the question or questions in the context of the whole case and the nature of the information sought to be elicited. Until that moment, it cannot be known which of the many possible questions will require answers which may be incriminatory. Thus it seems to me that in all civil cases as long as it is possible that one question may be answered, the spirit of the Federal Rules requires that the witness be sworn and the district court must make the determination whether particular questions must be answered, and not the party himself." (Emphasis added).

The position of the Respondents on the claim of the individual Petitioners' right not to be deposed is best illustrated by the language of the concurring opinion of Judge Lumbard in the case of *United States v. Matles, supra*, at page 382:

"The issue of whether Matles may refuse to be sworn as a witness is of such importance in the administration of justice in all civil cases that I take this occasion to make my own position clear. *On reason and precedent, Matles, like any other party or witness in a civil suit, and not under indictment on similar charges, may not refuse to be sworn as a witness."*

* * * * *

"In any event, this defendant, not being under indictment on charges similar to those at issue in this denaturalization proceeding, *is not in a posi-*

tion similar to that of an accused in a criminal prosecution. While it cannot be said that the denaturalization defendant faces no dangers, they are different in nature and degree from those faced by an accused, *and are such as must be faced by any defendant in a civil suit if our methods of seeking and finding the facts are to function fairly and effectively.*

"The danger underlying the accused's right not to take the stand and to be sworn is that a refusal by him to answer might emphasize in a particularly prejudicial way that the accused considers certain questions incriminatory and the jury may consider his refusals to answer as the equivalent of damaging answer. See 8 Wigmore § 2268 (3d ed. 1940); United States v. Scully, 2 Cir., 1955, 225 F. 2d 113, 115-116, certiorari denied 1955, 350 U. S. 897, 76 S. Ct. 156, 100 L. Ed. 788; Grunewald v. United States, 77 S. Ct. 963.

"But no such prejudice attaches to the refusal to answer questions at an examination before trial in a civil case. * * *"

"Moreover, as in any civil action, the denaturalization defendant has notice in advance regarding the issue and the assistance of counsel at every step of the way, for every question. *He can claim his privilege as to each alleged incriminatory question as it is asked. This is all the protection which is necessary.*

"I do not believe that the possibility of inadvertent waiver, which is reduced to a minimum where counsel is present, justifies the extension of the privilege in violation of the rights of the other

*party and in derogation of the fact-finding policy of the Federal Rules of Civil Procedure. No court has yet accepted or even suggested such a doctrine. * * *"*

"Furthermore, fear of inadvertent waiver would justify a refusal to be sworn in any civil case where the main charge could also be ground for criminal prosecution, e.g., a suit in negligence where the charge is reckless or drunken driving or a suit for conversion or embezzlement. In each case it could be argued that most questions could be incriminatory and that there is a danger that a party may waive his privilege and be forced to answer a series of incriminatory questions. I doubt that anyone would be willing to allow such a frustration of the fact-finding process in these other contexts, but the logic of such reasoning is not limited to denaturalization—it would extend to any civil action where the main charges could be the basis of a criminal prosecution. I find it hard to believe that this far reaching result is at all necessary, especially in view of the defendant's existing protection." (Emphasis added).

Cf. Dissenting opinion of Mr. Justice Frankfurter in *United States v. Monia, supra,* at page 433.

The logic and reasoning of Judge Lumbard are compelling, and the facts are not different save this case involves civil actions in antitrust, whereas the case of *United States v. Matles, supra,* involved a civil matter in naturalization. If these individual Petitioners feel that any question would tend to incriminate them, they should be sworn and deposed and the questions put to

them. They may then assert their constitutional privilege and the matter may be then taken to the District Court for an adjudication by the Judge as to whether or not the questions would tend to incriminate these individual deponents. Thereafter, if the deponents feel that the decision of the District Court is in error, they have remedies available to them, but these remedies do not, at this time, include the right to have this Honorable Court pre-judge that their Fifth Amendment rights against self-incrimination has been abridged until this Court has specific facts before it.

(2) Corporate Imposition of the Fifth Amendment Against Self-Incrimination.

An examination of the Petition for Writ of Certiorari in this matter shows that two of the seven Petitioners are corporations, to wit, American Pipe and Construction Company and United Concrete Pipe Corp. Although not stated directly in the Petition, these corporate Petitioners by implication, assert that they, as well as the individual Petitioners, are entitled to the Fifth Amendment privilege against self-incrimination. Clearly, this is contrary to the law as enunciated by this Court on many occasions. The Fifth Amendment privilege does not protect a corporation or its officers against self-incrimination for the purposes of discovery under the *Federal Rules of Civil Procedure*. *Oklahoma Press Pub. Co. v. Walling* (S. Ct., 1945), 327 U. S. 186; *United States v. Bausch & Lomb Optical Co.* (1943), 321 U. S. 707; *Wheeler v. United States* (S. Ct. 1913), 226 U. S. 478; *Wilson v. United States* (S. Ct., 1911), 221 U. S. 361; and *Hale v. Henkel* (S. Ct., 1906), *supra*.

(3) The Petitioners Herein Have Shown No Abuse of Discretion by the District Court.

Implicit in the contention of the Petitioners herein is their claim that Judge Yankwich and Judge Hall abused their discretion in denying the Motions of the Petitioners to stay discovery. As the Respondents have heretofore shown, Judge Yankwich, at the hearing on September 9, 1963, took great pains to point out to the Petitioners that notwithstanding his denial of their Motions to stay discovery, that denial would not preclude the Petitioners from asserting the privilege against self-incrimination when their depositions were taken. [Rep. Tr. of hearing of September 9, 1963, p. 6, lines 23-45 and p. 7, lines 1-3 and 13-20]. In addition, Judge Yankwich pointed out to Counsel for the Petitioners that there was no stigma attached to the assertion of the Fifth Amendment privilege by these individual Petitioners [Rep. Tr. p. 7, lines 13-20]. Counsel for the Petitioners concurred in that statement [Rep. Tr. p. 7, lines 21-22].

The facts of the within case are identical to those in the case of *Meyer v. Brooks* (S. Ct., Tex., 1962) 360 S. W. 2d 518. In that case Meyer was the Sheriff of Jefferson County, Texas. The State of Texas felt that Sheriff Meyer had been guilty of some extra-curricular activities while in office, and filed five indictments in the State Court against him, the first two charging bribery, and the last three charging false statements made in Sheriff Meyer's report of election campaign expenses and contributions. Subsequent to the filing of the five criminal indictments against Sheriff Meyer, the State of Texas on relation of certain citizens brought a civil action for the removal of Sher-

iff Meyer from the office of Sheriff of Jefferson County. The State then filed a notice in the civil action for the taking of Sheriff Meyer's deposition. The Defendant Meyer then filed a notice of motion to quash the taking of his deposition under Rule 180b of the *Texas Rules of Civil Procedure*, which Rule is substantially the same as Rule 30(b) of the *Federal Rules of Civil Procedure*. The trial court overruled the defendant's motion without prejudice to his right to assert his constitutional privilege against self-incrimination by refusing to answer any question which might tend to incriminate him. Meyer then filed a Petition for Writ of Mandamus in the Texas Supreme Court to require the trial judge to revoke his order overruling the motion. The Texas Supreme Court, in denying Meyer's Petition for Mandamus expressly distinguished the cases of *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., Inc.* (E. D., Pa., 1953), 14 F.R.D. 333; *National Discount Corp. v. Holzbaugh* (E. D., Mich., 1952), 13 F.R.D. 236, and *United States v. Bridges* (N.D., Cal., 1949), 86 F. Supp. 931, cases cited by the petitioners in their Petition for Writ of Certiorari, and said:

> "The decisions relied upon all issue from the United States District Court. So far as we can ascertain, the point has not been tested on appeal. * * * Actually, the only authoritative construction, we think, given by the Federal Courts to Rule 30(b) is that the trial judge is vested with judicial discretion in acting upon a motion to stay the taking of the deposition of a party and before his ruling may be set aside there must be shown *a clear abuse of discretion.* * * * Since

the question of whether the taking of a deposition be stayed or not, lies within the judicial discretion of the trial judge, it cannot be said with any degree of certainty that, if the trial judge had not granted the stay in Harrigan v. Enterprise and National Discount v. Holzbaugh, the Federal Courts would have held that the failure to do so would amount to abuse of discretion. Moreover, in the case here the factual situation differs. As pointed out above, among the various grounds upon which removal of the Sheriff is sought only on one, namely, bribery has he been indicted, and Rule 30(b) even as applied by the Federal District Courts would have no application to the remaining charges." (Emphasis added).

In the case of *National Bondholders Corporation v. McClintic* (D.C., 1938), 99 F. 2d 595, the Court, in discussing the matter of judicial discretion in the matter of the taking of depositions, stated as follows:

"* * * The determination of the existence of a sufficiency of the cause against taking the depositions in this case was for the district judge in his judicial discretion. On this application for mandamus to reverse his ruling on an interlocutory matter, we cannot properly substitute our judgment for his as to the determination of what constituted good cause for the order even though if and when the case should ultimately be here on appeal, the Court may be of a different opinion."

In the case of *Landy v. United States* (5th Cir., (1960), 283 F. 2d 303, the Circuit Court affirmed a judgment of the trial court requiring Landy to respond

to an administrative subpoena of the Internal Revenue Service, and states:

> "We hold that the trial court correctly decided that it could not quash the subpoena on the general allegation that it was intended for purposes other than those for which it purported to issue, and that it might result in questions which the subpoened witness could constitutionally refuse to answer. *The privilege of the fifth amendment must be exercised in connection with precise questions, and not as a general excuse for refusing to appear in response to subpoena.*" (Emphasis added).

For the reasons herein stated, the Respondents feel that the Petitioners cannot show that at the present time the Court has before it any matters prejudicial to the rights of the individual Petitioners, and they have not sustained the burden of showing that the District Court, more particularly Judge Yankwich and Chief Judge Hall, have abused their judicial discretion in denying the Motions of the Petitioners to stay discovery in the three civil antitrust matters. Quite the contrary, Judge Yankwich, in his remarks at the hearing on September 9, 1963, took great pains to point out to the Petitioners that the individual Petitioners when they were deposed could assert their Fifth Amendment privilege against self-incrimination if and when the questions were put to them. An examination of the transcript of the hearing before Chief Judge Hall shows that Judge Hall was not disposed to disturb the ruling of Judge Yankwich. [Rep. Tr. of hearing of November 4, 1963, p. 11; lines 8-9]. Furthermore, Judge Hall reiterated the statement made by Judge Yankwich

on September 9, 1963, that the deponents could refuse to answer. [Rep. Tr. of hearing of November 4, 1963, p. 12, lines 21-22].

At the hearing on November 7, 1963, the Circuit Court of Appeals for the Ninth Circuit, in its remarks to Counsel for the Petitioners during oral argument on their Application to file a Petition for Writ of Mandamus, expressly indicated to Counsel for the Petitioners that any ruling by the Circuit Court at that time for the mere taking of the depositions of the individual Petitioners, would not constitute a waiver by them of their Fifth Amendment privilege against self-incrimination, which privilege could be asserted by them at a time subsequent when their depositions were taken.

Conclusion.

The United States District Court for the Southern District of California and the Court of Appeals for the Ninth Circuit have not arbitrarily decided important constitutional questions adversely to these Petitioners. Quite the contrary, those Courts have taken great pains to point out to these Petitioners that at the proper time and place they can assert their Fifth Amendment privilege when the particular questions are put to the individual deponents taking into consideration the status of the deponents, that is to say, whether or not they have been granted immunity, and the nature of the questions put to them. The Petitioners ask this Honorable Court to pre-judge that each and every question put to each and every deponent would tend to incriminate him, and that the individual Petitioners have the right that they not be deposed in these three civil antitrust matters. This, the Respondents contend is

contrary to the established law as adopted by this Court and by the lower Federal Courts, and is contrary to the philosophy of discovery as enunciated by the *Federal Rules of Civil Procedure*. For these reasons, as well as the others set forth, the Respondents and Real Parties in Interest respectfully submit and request that the Petition for Writ of Certiorari sought herein be denied.

Respectfully submitted.

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